that hears the original charge, and an appellate Court is always loath to interfere with that discretion. The learned President has clearly attached considerable importance to the fact that the Assistant Secretary to the City Council himself came forward and gave evidence as to the hitherto excellent character of the respondent over a long period of years. He has also taken into consideration the fact — unchallenged by the prosecution — that the respondent's wife had been mentally and physically ill for some time before the offence was committed and that this had involved the respondent in mental anxiety and additional financial expenditure. These were matters which, assuming them to be true, the learned President very rightly and properly took into consideration when assessing an appropriate punishment. It may well be that in the result the learned President imposed a considerably more lenient sentence than would have been imposed by a differently constituted Court. But in all the circumstances of the case I do not consider that the ends of justice would be furthered if this Court were now to interfere with the order made by the learned President. In those circumstances this appeal must be dismissed.

Appeal dismissed.

LOOI TEIK LAN v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Hill and Good JJ. A.) April 11, 1960]

[Penang — F.M. Criminal Reference No. 1 of 1960]

Customs and Excise — Intoxicating liquor — Possession of, in respect of which excise duty had not been paid — Onus — Excise Enactment (Cap. 133), ss.53 and 62 — Entry in Retail Stock Book — Language of entry — Excise Rules, 1923, r.61.

In this case the only point in dispute was whether duty had been paid on a certain quantity of samsu that was found in the appellant's premises.

Held: by reason of section 53 the onus of proving that duty had been paid on the samsu lay on the appellant, or at the very lowest to raise a reasonable doubt on the point in the mind of the Court. This, he could do either by adducing evidence of his own to show that duty had in fact been paid or by showing that the prosecution evidence gave rise to an inference to the same effect.

Observations on making entry in Retail Stock Book.

Cases referred to:—

(1) *Kee Kim Chooi* v. *Public Prosecutor* [1952] M.L.J. 180.

(2) *R.* v. *Cohen* [1950] 1 All E.R. 203, 206.

(3) *Rex* v. *Aves* [1950] 2 All E.R. 330.

COURT OF APPEAL.

B. K. Das for the appellant.

L. A. Massie (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson C.J. (with whom **Hill** and **Good JJ.A.** agreed): This appellant was convicted in the Magistrates' Court at Ipoh for three offences in contravention of the Excise Enactment.

In the first place he was convicted for having in his possession 5¼ gallons of intoxicating liquor in respect of which excise duty had not been paid in contravention of section 62 of the Excise Enactment and was fined $1,000 or three months' imprisonment in default. In the second place he was convicted for having in his possession a quantity of liquor contained in 293 bottles in contravention of the same section of the same Enactment and was fined $5,000 or twelve months' imprisonment in default. In the third place he was convicted for failing to keep up daily the Retail Stock Book which he was required to maintain by Rule 61 of the Excise Rules, 1923, and was fined $150 or two weeks' imprisonment in default.

The appellant appealed against these convictions and in the event Azmi J. set aside the two convictions for offences under section 62 of the Enactment and substituted for them a conviction on a single charge of having in his possession 33½ gallons of intoxicating liquor in respect of which excise duty had not been paid. In respect of that conviction he imposed a fine of $4,250 or six months' imprisonment in default.

As regards the conviction for not maintaining the Retail Stock Book he dismissed the appeal against conviction but took the view that the offence was a purely technical one and reduced the sentence to a fine of $5.

He was, however, of the opinion that the appeal as a whole involved a point of law relating to the extent to which section 53 of the Excise Enactment places an onus upon the defence in cases such as this and accordingly he gave a certificate under section 34 of the Courts Ordinance to enable the appeal to be re-heard by this Court.

The appellant is a licensed wholesale and retail dealer in intoxicating liquor carrying on business at No. 19 Treacher Street, Ipoh. He deals in all sorts of intoxicating liquors but in the present case we are only concerned with so much of his business as consists in dealing in samsu.

In this connection his course of business is that he buys from distilleries quantities of samsu of very considerable strength which I shall call "straight spirit". Each consignment of this straight spirit from the distillery is accompanied by a Customs permit showing that excise duty has been paid in respect of it. From time to time he deals with this spirit which he obtains from the distillery by mixing it with varying proportions of water and other ingredients and putting it into bottles to which are attached labels bearing the names of various brands. I shall call this "blended spirit".

The bottles of blended spirit are then placed in a wholesale stock from which they are from time to time removed either for sale by wholesale or for transfer to a retail stock from which they are sold in small quantities to members of the public.

As required by law, records covering these operations are kept in three main books, a Book of Manufacture, a Wholesale Stock Book and a Retail Stock Book. There is also a Daily Sales Book, but I shall deal with that separately at a later stage.

The Book of Manufacture sets out each receipt of straight spirit from the distillery with its alcoholic proof strength and the number of the Customs permit relating to it. Then in respect of each occasion on which this spirit is converted into blended spirit of a lower proof strength for bottling the book shows on the one hand the amount and strength of the straight spirit so used and on the other hand the amount, the strength and the number of bottles of each size of the resulting blended spirit of each brand. From this book, the accuracy of which has not been questioned, it is clear that the proof strength of the straight spirit from the distillery ranged from 159.8% down to 87% and that the proof strength of the blended spirit produced from it varied from 70% down to 30%.

On 27th August, 1958, a party of Customs Officers visited and inspected the appellant's premises. They examined the downstairs part of the premises where he kept his wholesale stock and his retail stock. They checked his retail stock and found that apart from a very trivial discrepancy it corresponded with the amount shown in the Retail Stock Book. Then they checked the wholesale stock and found that it was from 25 to 30 gallons less than it should have been according to the figures shown in the Wholesale Stock Book. As all the stuff was contained in bottles of standard size I fail to see why an exact figure could not have been stated for this shortage. The evidence, however, is silent on the point and for some reason or other the Wholesale Stock Book itself has not been produced.

Then the party went upstairs to the portion of the premises where the appellant carries on his blending operations. There they found a red drum containing 54 gallons of samsu of a proof strength of 72.3%. They also found about 935 bottles of various sizes containing about 52 gallons of samsu. 439 of these bottles, some of them labelled and others not labelled, contained about 29 gallons of liquor of proof strength varying between 64.8% and 66.8%, those which were labelled bearing the label of "V" brand. Then there were 260 bottles containing about 13 gallons of spirit of proof strength varying from 40.1% to 39.1% some of them unlabelled and others labelled with a label bearing the brand name of "Angel". Finally there were 236 bottles labelled "Bee Chew" containing about 10 gallons of spirit of a strength of 38.3%. A labourer was in the act of affixing "V" brand labels to the bottles of stronger liquor.

At the time and later the appellant made statements to Customs Officers to the effect that the liquor which was found upstairs had come there from the wholesale stock, that certain brands sold well and other brands did not sell so well and that what was happening was that the brands which did not sell so well were being converted into the "V" brand which did sell well. I will return to this explanation at a later stage.

It was on these facts that the prosecution saw fit to prosecute the appellant for the offences in contravention of section 62 of the Excise Enactment.

Once charges were formulated under that section there was an allegation that excise duty had not been paid and when the appellant claimed trial on the charges a dispute arose as to whether that duty had been paid. There thus came into operation the provisions of section 53 of the Enactment, the material portions of which read as follows:—

> "If in any prosecution in respect of any intoxicating liquors or goods seized for non-payment of excise duties . . . . . any dispute shall arise as to whether the duties have been paid in respect of such liquors . . . . . in every such case the proof thereof shall be on the defendant in such prosecution".

Here there was a dispute as to whether excise duty had been paid and the effect of the section thus was that the onus of proving that the duty had been paid was placed upon the appellant.

Section 53 of the Excise Enactment is substantially the same as section 99 of the Customs Enactment and is similar to section 114(ii) of that Enactment. The effect of these sections was discussed in the case of *Kee Kim Chooi* v. *Public Prosecutor*[1] where it was pointed out that there is no question of the weight of the onus laid by the statute upon the accused "being anything like the weight that ordinarily lies upon the prosecution in a criminal case". It was said (in the words of Lord Goddard in the case of *Rex* v. *Cohen*[2]) that such "cases are closely analogous to cases of receiving stolen goods when the evidence relied on by the prosecution is merely possession of goods recently stolen" and that the weight of that onus was thus described by Lord Goddard in the case of *Rex* v. *Aves*[3] in the following words:—

> "Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty".

In the present case what was in dispute was whether duty had been paid on all the samsu that was found upstairs. The appellant was proved to be in possession of it and by reason of section 53 the onus of proving that duty had been paid on it lay on his shoulders. It was for him to show positively that duty had been paid on all this samsu or at the very lowest to raise a reasonable doubt on the point in the mind of the Court. This, of course, he could do either by adducing evidence of his own to show that duty had in fact been paid or by showing that the prosecution evidence gave rise to an inference to the same effect.

At the original trial, at the hearing of the appeal before Azmi J., and before us the main effort of the defence was to attempt to show that the prosecution evidence rightly considered did make out that duty had been paid on all the samsu found upstairs or at the very lowest left the question of payment of duty in doubt.

In certain circumstances a difficult question might arise as to when this could be said to be made out. In the present case, however, that question does not arise because in our view the prosecution evidence did not support any inference that went any distance at all towards making it out or raising any doubt.

On the evidence, the only sources from which duty-paid samsu came on to the appellant's premises as a whole were the distillery at Kuala Lumpur and another distillery and it was the appellant's case that all the samsu found on his premises was derived from this supply.

The Book of Manufacture shows that on 1st January, 1957, there was one gallon of straight spirit in stock and that from then until 31st July, 1958, 521 gallons were purchased, the minimum strength of which was 87% over proof. That makes a total of 522 gallons. The book also shows that up to 31st July, 1958, 522 gallons of spirit had been broken down into various brands of blended spirit, the maximum strength of which was 70% proof. From this the clear inference is that after 31st July, 1958, every gallon of duty-paid spirit from the distillery had been transmogrified into spirit of varying strengths not exceeding 70% proof. This inference finds support in the evidence of the Manager of the Kuala Lumpur distillery from whom all stocks had been obtained since the end of January, 1957, that is a week before the visit to the appellant's premises by the Customs Officers, the appellant had ordered further spirit from him, but this was not supplied because the money was not sent and the account for previous supplies had not been settled.

The total amount of spirit found upstairs was about 57 gallons, 5 gallons in a drum and 52 gallons in bottles of various sizes.

Taking first the spirit in the drum, this was of a strength of 72.3% proof. Now, this could not have been produced directly from straight spirit from the distillery for all this had already been broken down to strengths of 70% and under. Nor could it have come indirectly from the stocks from the distillery by dealing with spirit already broken down to lower strengths for this could only have been done by some chemical process or by some process of distillation. There is no evidence of anything of the sort having been done and of course if it had been done it would have been within the knowledge of the appellant. In the circumstances there is only one possible conclusion and that is that the contents of the drum must have come from a source other than the distillery. It was for the appellant to show what that source was and that it was a duty-paid source and he made no attempt whatsoever to do so.

Turning now to the spirit which was found upstairs in bottles, it was the appellant's case that all this also came from the duty-paid supplies of straight spirit obtained from the distillery. This had been broken down into various brands of blended spirit which had been put in the wholesale stock and which had later been removed from that stock to be reblended into other brands. Up to a point there was some support for this story because it had been found that the wholesale stock was 25 to 30 gallons short which might well be consistent with 25 to 30 gallons having been removed from the stock for reblending. It is to be remembered, however, that the total amount of spirit found upstairs in bottles was 52 gallons and an examination of this 52 gallons in the light of the information contained in the Book of Manufacture shows that it is for all practical purposes impossible that all of it came from the wholesale stock downstairs, although a portion of it may well have done so.

The Book of Manufacture shows that all the 522 gallons of straight spirit from the distillery was from time to time broken down into six different brands of blended spirits the names and the maximum proof strengths of which are as follows:—

1. "V" - - - - - - 70%
2. "Sam Cheng" - - - - 60%
3. "Angel" - - - - - 40%
4. "Song Cheng" - - - - 38%
5. "Eng Swee Foo Guan" - - 35%
6. "Choon Yuen" - - - - 70%

If anything, therefore, which had origina'ly come from the distillery was brought from downstairs for reblending it must have been from one of these six brands.

Now, part of the spirit found in bottles upstairs consisted of 29 gallons of a minimum proof strength of 64.8% which was labelled or about to be labelled "V" brand. As has been said there is no evidence of any distillation having been carried on in the premises and so if this spirit came from downstairs it cou'd only have come from the existing stock of "V" brand or from the stock of "Choon Yuen" for these were the only two brands with a greater strength than 64.8%. But, if the appellant's story was true it could not have come from the stock of "V" brand downstairs for his story was that this was one of popular brands of which he was making more and in the circumstances he would not be reblending what had already been made. It follows, then, that if it came from downstairs at all it came from the stock of "Choon Yuen". If it did so, however, it must have exhausted that stock for according to the book only 28 gallons of this was ever made.

Then there was 13 gallons of "Angel" in bottles of a minimum proof strength of 39%. For the reasons that have been stated this could not have come from the stock of "V" brand nor for similar reasons could it have come from the stock of "Angel" brand for that was the other one of the two popular brands that was being blended. Again it is highly improbable that it came from the "Sam Cheng" brand because according to the book that brand had last been blended from straight spirit on a date subsequent to the last date on which "V" brand was blended and this clearly shows that it was a brand for which there was an active demand. This 13

gallons of spirit, then, could only have come from the "Choon Yuen" brand and then only if that had not already been all exhausted in being reblended into "V" brand.

Finally, there was 10 gallons in bottles of "Bee Chew" of a proof strength of 38% and of course bearing in mind the shortage in the wholesale stock this might well have come from downstairs.

These considerations would seem to produce this dilemma. Either "V" brand or the "Angel" brand could have come from the "Choon Yuen" brand downstairs but they could not both have come from it because there was not enough of it. There could not have been more than 28 gallons of this and its proof strength was 70%. It is a clear physical impossibility that this could have been broken down so as to produce 29 gallons of spirit of a proof strength of 64.8% and 13 gallons of a proof strength of 39%. There was no other possible source of supply whose ancestry could be traced back to the spirit obtained by the appellant from the distillery and in the circumstances the inference is irresistible that at least some of this 12 gallons of spirit came from some other source. It was for the appellant to show what that source was and he made no attempt to do so.

In the circumstances we would deal with the appeal as Azmi J. did by substituting for the first two convictions a single conviction and substituting for the first two fines of $1,000 and $5,000 a single fine of $4,250 or six months' imprisonment in default.

There remains the conviction for failing to keep up daily a Retail Stock Book in contravention of rule 61 of the Excise Rules, 1923. The allegation here was that the appellant had not made daily entries in an account book of his sales of liquor. The admitted facts are that he had not made these entries in his Retail Stock Book for some days but had made them in the Chinese language in another account book from which his Retail Stock Book was made up from time to time. The Magistrate gave no grounds for convicting him. Azmi J., after having pointed out that the rules do not specify any special form in which the entries are to be made went on to say that he would have accepted that there had been compliance with the rule if the rough book had been kept in English or Malay "since both are the languages of this Government". As, however, it was kept in Chinese he held there had not been compliance with the rule and he therefore upheld the conviction but taking the view that the offence was very technical reduced the fine imposed by the Magistrate to a nominal one of $5.

Here we can agree neither with the Magistrate nor with Azmi J. The rule requires that particulars of liquor sold "shall be entered each day" in an account book but nowhere in the Enactment or in the Rules is there any requirement that this or any other book shall be kept in any particular language. Where a statute requires an entry to be made in any book in any particular language it must say so. Examples of this are to be found in section 9 of the Pawnbrokers Enactment, various sections of the Rubber Supervision Enactment and in the Required Records and Accounts Ordinance, 1950. There is nothing of this sort here and therefore this conviction must be set aside.

Order accordingly.

Solicitors: *Das & Co.*

MAT'AIL v. MEK

[A. C. J. (Hepworth J.) April 12, 1960]

[Kota Bharu — Civil Appeal No. 14 of 1959]

Land Laws — Registered proprietor in possession — Interest — Finding by District Officer — Kelantan Land Settlement Ordinance, 1955, ss.7, 8 and 16 — Interpretation — Objects and Reasons in Bill.

Where the person in possession of land is the registered proprietor, the District Officer may make a finding under section 7 of the Kelantan Land Settlement Ordinance, 1955, but not one under section 8. A finding under section 7 must be as to the fact of possession and may decide nothing as to the right to possession.

Kelantan Land Settlement Ordinance, 1955, interpreted in the light of the Objects and Reasons published when that Ordinance was introduced as a Bill.

APPEAL under section 16, Kelantan Land Settlement Ordinance.

Parties in person.

Hepworth J. (delivering oral judgment): This is an appeal under section 16 of the Kelantan Land Settlement Ordinance, 1955, by one Ismail bin Hamat against an order of the District Officer, Pasir Mas, made under section 16, quashing a finding of the Assistant District Officer, made at an enquiry held under section 5 of the Ordinance, that the appellant was entitled to ½ of Lot 930, Mukim Bechah Semak, District of Pasir Mas, under section 8(1) and the respondent was entitled to the other ½ under section 7 of the Ordinance, and finding that the respondent was the proprietor in possession of the whole of the land concerned under section 7 of the Ordinance.

At the date of the enquiry by the Assistant District Oificer, which for some unaccountable reason appears nowhere in the Record, but which took place sometime in late 1958 or in early 1959, the respondent was the registered proprietor of Lot No. 930, Mukim Bechah Semak, Daerah Bunut Susu, in the District of Pasir Mas.

Letters of Administration in the Estate of Mamat bin Awang Kechik deceased, the father of the respondent, who had died in 1928, in Petition No. 399 of 1954, were granted to one Sulaiman